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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. NATHANIEL HILLSMAN, Defendant and Appellant.	B235365 (Los Angeles County Super. Ct. No. BA 381271)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Leslie A. Swain, Judge. Affirmed as modified.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, and Chung L. Mar, Deputy Attorney General, for Plaintiff and Respondent.

SUMMARY

Defendant Nathaniel Hillsman was convicted of vehicular manslaughter while intoxicated. We hold defendant may not also be convicted of driving under the influence causing injury, or of driving with 0.08 percent blood alcohol causing injury, because these crimes are necessarily included offenses of vehicular manslaughter while intoxicated. We also find defendant is entitled to additional presentence custody credits. We direct the trial court to amend the abstract of judgment in accordance with these conclusions, and otherwise affirm the judgment.

FACTS

A jury found defendant not guilty of gross vehicular manslaughter while intoxicated (count 1 of the information), but convicted him of the lesser included offense of vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (b)), later denominated count 4 by the trial court. The jury also found defendant guilty of driving under the influence of alcohol, causing injury (Veh. Code, § 23153, subd. (a)) (count 2), and driving with a 0.08 percent blood alcohol, causing injury (Veh. Code, § 23153, subd. (b)) (count 3). The jury found true the allegation (attached to counts 2 and 3) that defendant personally inflicted great bodily injury upon the victim. (Pen. Code, § 12022.7, subd. (a).) After defendant waived a jury trial, he admitted two prior convictions, and the trial court found the convictions qualified as enhancements under Penal Code section 667.5, subdivision (b).

The court sentenced defendant to six years in state prison: the high term of four years for the crime of vehicular manslaughter while intoxicated, plus two years for the prison priors. The court made other orders and imposed various fines, including a court security fee of $40 (Pen. Code, § 1465.8) and a criminal conviction assessment fee of $30 (Gov. Code, § 70373). The court found that defendant's convictions on the crimes charged in counts 2 and 3 merged under Penal Code section 654, and that "the sentence in those matters would be three years on each count . . . which is stayed until such time as his prison term is served in count [4]," at which time "the stay will

become permanent."[1] The court did not refer to the great bodily injury enhancements attached to those counts.

When the court inquired about defendant's credits, his counsel replied that defendant had 318 days actual time, calculated from October 5, 2010, until August 16, 2011 (the day of sentencing) and including "two days on the date of the accident." The court then stated defendant "has credit for 159 days good time/work time credit for a total of 477 days credit."

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends his convictions for driving under the influence causing injury and driving with 0.08 percent blood alcohol causing injury must be reversed because they are necessarily included offenses of vehicular manslaughter while intoxicated. We agree.

"A defendant cannot be convicted of both an offense and a lesser offense necessarily included within that offense, based upon his or her commission of the identical act. [Citation.] In deciding whether an offense is necessarily included in another, we apply the elements test, asking whether ' " 'all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.' [Citation.]" ' [Citations.] In other words, 'if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' [Citations.]" (*People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1147 (*Binkerd*).

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1 The minute order differs from the reporter's transcript. It states that, on count 2, the court selected the middle term of two years (and imposed a $40 court security fee and a $30 criminal conviction assessment), with the sentence stayed under Penal Code section 654. The minute order further states that counts 2 and 3 merge for purposes of sentencing, and shows identical sentencing on count 3 (the middle term of two years, plus $40 court security fee and a $30 criminal conviction assessment, with the sentence stayed). The "general rule is that the oral pronouncements of the court are presumed correct." (*People v. Thompson* (2009) 180 Cal.App.4th 974, 978.)

In this case, defendant was convicted of vehicular manslaughter while intoxicated. That crime "is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, but without gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, but without gross negligence." (Pen. Code, § 191.5, subd. (b).)

The other two crimes of which defendant was convicted were violations of Vehicle Code section 23153 (one of the elements of the vehicular-manslaughter-while-intoxicated statute), as follows: (1) Driving under the influence causing injury. This crime occurs when a person "while under the influence of any alcoholic beverage or drug, . . . drive[s] a vehicle and concurrently do[es] any act forbidden by law, or neglect[s] any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver." (Veh. Code, § 23153, subd. (a).) (2) Driving with 0.08 percent blood alcohol causing injury. This crime occurs when a person "while having 0.08 percent or more, by weight, of alcohol in his or her blood . . . drive[s] a vehicle and concurrently do[es] any act forbidden by law, or neglect[s] any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver." (Veh. Code, § 23153, subd. (b).)

Respondent concedes that the Vehicle Code section 23153, subdivision (a) violation—driving under the influence causing injury—is a lesser included offense of vehicular manslaughter while intoxicated, and the concession is correct. (See *Binkerd, supra*, 155 Cal.App.4th at pp. 1146-1147 [driving under the influence of alcohol causing injury is a necessarily lesser included offense of vehicular manslaughter without gross negligence]; see also *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466, 1468 (*Miranda*) [driving under the influence causing injury and vehicular

manslaughter are necessarily included within the offense of gross vehicular manslaughter while intoxicated; "Vehicle Code section 23153, subdivision (a) is necessarily included in Penal Code section 191.5"].)

Respondent insists, however, that the Vehicle Code section 23153, subdivision (b) violation—driving with 0.08 percent blood alcohol causing injury—is *not* a lesser included offense of vehicular manslaughter while intoxicated. Respondent argues that one can violate the vehicular manslaughter statute by violating Vehicle Code section 23140, which makes it illegal for a person under 21 to drive a vehicle with 0.05 percent blood alcohol. So, respondent continues, a person under 21 can commit vehicular manslaughter while intoxicated *without* violating Vehicle Code section 23153, subdivision (b).

Respondent's argument is illogical and incorrect. *Binkerd* rejected the argument, and so do we. (*Binkerd*, *supra*, 155 Cal.App.4th at pp. 1148-1149.) Among other things, the statute "is written in the disjunctive. The statute is violated if one drives a vehicle in violation of *either* Vehicle Code sections 23140, 23152, *or* 23153. The statute does not provide that one has to violate all three sections of the Vehicle Code to commit the offense of vehicular manslaughter." (*Id*. at p. 1149.) "In cases where one victim dies from an alcohol-related accident due to a violation of Vehicle Code sections 23140, 23152, or 23153, the Vehicle Code violation would always be a lesser included offense of [the vehicular manslaughter statute]." (*Ibid*.)

As the court stated in *Miranda*, "One person who injures a person while driving under the influence commits a violation of Vehicle Code section 23153; and if that person dies from that injury . . . a violation of Penal Code section 191.5 has occurred." (*Miranda*, *supra*, 21 Cal.App.4th at p. 1468.) The same is true of section 23153, subdivision (b); the two cases are indistinguishable. A person who injures another person while driving with 0.08 percent blood alcohol—just as a person who does so while driving under the influence of alcohol or drugs—violates Vehicle Code section 23153. As in *Miranda*, if the victim dies, a violation of Penal Code section 191.5 has occurred. (See *Miranda*, *supra*, 21 Cal.App.4th at p. 1468.)

In short, the reasoning in *Miranda* and *Binkerd* is dispositive. Under the statutory elements test, *both* violations of Vehicle Code section 23153 are necessarily lesser included offenses of vehicular manslaughter while intoxicated. Defendant's convictions of the two Vehicle Code crimes therefore must be reversed, and the true findings on the great bodily injury enhancements attached to them stricken.

Defendant also contends that resentencing is required, and that because resentencing would occur after October 1, 2011, the effective date of the 2011 realignment legislation, he must be resentenced under that legislation. But resentencing is not required.

As was the case in *Miranda*, we are reversing convictions and striking related enhancements, and all the trial court need do is prepare an amended abstract of judgment as we direct. (See *Miranda, supra,* 21 Cal.App.4th at pp. 1468-1469.) Defendant contends that the *Binkerd* court remanded that case for resentencing. In *Binkerd*, however, resentencing was necessary because the trial court had sentenced defendant, following the defendant's no contest plea, on the lesser included offense with enhancements instead of on the vehicular manslaughter count, so it was not clear what sentence the court might have imposed if it had not erred. (See *Binkerd, supra,* 155 Cal.App.4th at pp. 1145-1146, 1147.) No such circumstances exist here, where the court properly sentenced defendant on the principal offense.

Finally, defendant contends he is entitled to additional credits for time actually spent in presentence custody, and to additional presentence conduct credits. Defendant is wrong on the first point but correct on the second.

Defendant asserts he was taken into custody on August 22, 2010, and remained in county jail until his sentencing on August 16, 2011, a total of 360 days (rather than 318). But defendant cites nothing in the record to support that contention, and his trial lawyer represented otherwise to the trial court, telling the court, in defendant's presence, that defendant had 318 days actual time, "calculated . . . from October 5 until today," and that defendant "also had two days on the date of the accident." In his reply brief, defendant points to the probation officer's preconviction report, prepared

on April 18, 2011, which lists "[e]stimated days in jail this case" as 200 days. Then defendant asserts that "[f]rom the date of arrest [August 22] through the date of the pre-conviction report [April 18] is exactly 200 days . . . ." If this were so, it would support defendant's claim, but it is not so. There are 240 days between August 22 and April 18, not 200. So, the preconviction report merely confirms that trial counsel's report of actual time served—that defendant was in jail for two days at the time of the incident and after that was in custody beginning on October 5—was correct: On the facts as counsel stated them, defendant had been in custody for 198 days on April 18, when the preconviction report was prepared stating that "[e]stimated days in jail this case" were 200. Thus, there is no showing that the number of actual days in custody was anything other than 318.

Defendant next contends he is entitled to additional conduct credits beyond the 159 days awarded by the court. On this point, he is correct.

Penal Code section 4019 was amended effective January 25, 2010 (the January 2010 amendment), and the January 2010 amendment was in effect when defendant's crime was committed (on August 22, 2010). (Former Pen. Code, § 4019, as amended by Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.) Under the January 2010 amendment, "a term of four days will be deemed to have been served for every two days spent in actual custody" (former Pen. Code, § 4019, subd. (f)), giving a defendant two days of conduct credit for every two days in custody. (The statute was amended again effective September 28, 2010, and again in 2011, but those amendments applied prospectively to prisoners confined for crimes committed on or after specified dates and are not applicable to defendant.)[2]

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[2] Penal Code section 4019 currently provides, for example: "The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (Pen. Code, § 4019, subd. (h), fn. omitted; see also *Payton v. Superior Court* (2011) 202 Cal.App.4th 1187, 1190 & fn. 3 [September 2010 amendment applied only

Defendant committed his crime while the January 2010 amendment was in effect. He was therefore entitled to two days of conduct credit for every two days in actual custody, and should have been awarded 318 days of conduct credits (rather than 159), for a total of 636 days of presentence custody credit (rather than the 477 days actually awarded).

Respondent does not contest these calculations, but argues that defendant's conduct credits are limited to 15 percent of his actual days in custody under Penal Code section 2933.1, subdivision (a). That section puts a 15 percent limit on worktime credit for persons convicted of certain violent felonies, including "[a]ny felony in which the defendant inflicts great bodily injury on any person . . . which has been charged and proved as provided for in Section 12022.7 . . . ." (Pen. Code, § 667.5, subd. (c)(8).) Section 12022.7 enhances the punishment for the felony or attempted felony where the defendant "personally inflicts great bodily injury" in its commission (Pen. Code, § 12022.7, subd. (a)), but the enhancement does not apply to murder or manslaughter and does not apply if infliction of great bodily injury is an element of the offense. (Pen. Code, § 12022.7, subd. (g).)

Because defendant was convicted of vehicular manslaughter while intoxicated, the elements of which include great bodily injury, and because we reverse defendant's other convictions and strike the attached great bodily injury enhancements, there is no basis for limiting his conduct credits to 15 percent of actual days in custody.

DISPOSITION

The convictions of driving under the influence of alcohol, causing injury (count 2) and driving with a 0.08 percent blood alcohol, causing injury (count 3) are reversed, and the enhancements the jury found true as to counts 2 and 3 are stricken. The trial court is directed to prepare an amended abstract of judgment reflecting this modification; to further modify the abstract of judgment to show 318 days of local conduct credits and total credits of 636 days, a court security fee of $40 (instead of

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to prisoners confined for a crime committed on or after its effective date, citing Pen. Code, § 4019, subd. (g)].)

$120), and a criminal conviction assessment of $30 (instead of $90); and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.